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FISCAL IMPACT REPORT

ORIGINAL DATE 1/30/07
 SPONSOR Adair LAST UPDATED 3/15/07 HB _____
 SHORT TITLE DWI Chemical Test Time Limits SB 443/aHJC
 ANALYST Wilson

Relates to HB 420, SB 440 and HB 403

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		(Unknown)	Unknown)		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Department of Health (DOH)
 Department of Public Safety (DPS)
 Department of Transportation (DOT)
 Office of the Attorney General (OAG)
 Public Defender Department (PDD)
 Second Judicial District Attorney (SJDA)
 Sentencing Commission (SC)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment provides for the admissibility of Chemical Tests taken more than three hours after driving. If the test performed pursuant to the Implied Consent Act is administered more than three hours after the person was driving a vehicle, the test result may be introduced as evidence of the alcohol concentration in the person's blood or breath at the time of the test and the tier of fact shall determine what weight to give the test result.

The amendment also adds that the amount of alcohol in the person's breath as well as well as in their breath may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

The amendment also establishes minimum hours for community service. Upon a first conviction of aggravated driving while under the influence of intoxicating liquor or drugs, an offender shall be sentenced to not less than 24 hours of community service. Upon a second conviction of aggravated driving while under the influence of intoxicating liquor or drugs, an offender shall be sentenced to not less than 48 hours of community service. Upon a third conviction of aggravated driving while under the influence of intoxicating liquor or drugs, an offender shall be sentenced to not less than 96 hours of community service.

Synopsis of Original Bill

Senate Bill 443 amends the DWI statute, NMSA 1978, Section 66-8-102. At present, it is unlawful to drive a vehicle with a blood alcohol concentration (BAC) of .08 or more. HB 443 makes it unlawful to drive with a .08 BAC as proved by a test given within three hours of driving the vehicle where the BAC results from alcohol consumed before or while driving the vehicle.

FISCAL IMPLICATIONS

The long term impact of SB 443 will be to allow existing FTEs at the (SLD) to complete their required workload of drug testing more efficiently and within acceptable times to meet the needs of law enforcement and Office of the Medical Investigator (OMI). In recent years, the growing demand for expert witness testimony in DWI cases has diverted manpower from performing lab analyses and cause delays in results which have adversely affected DWI prosecution and the issuance of death certificates. Legislators and the Governor have received complaints about the delays. This bill will help remedy these delays as well as slowing the growth and need for additional FTEs.

SIGNIFICANT ISSUES

A recent appellate court decision in the State v Day case has changed the way that New Mexico courts approach DWI so that the prosecutors in a case now must present an expert witness to “back estimate” what the defendant’s blood alcohol level was at the actual time of the traffic stop. This is a problem for two reasons. First, the Scientific Laboratory Division (SLD) of the DOH, which provides the expert witness for these cases, has only six expert witnesses to cover the approximately 18,000 DWI prosecutions occurring each year in NM. In 2006, SLD received approximately 900 subpoenas for these six individuals to handle, which was beyond their ability. As a result, many DWI cases had to do without an expert witness. In light of the recent appellate decision, this jeopardizes the prosecution of DWI cases throughout the state.

Secondly, the back estimation of blood alcohol levels is difficult to do and requires detailed knowledge of the composition and timing of the defendant’s drinking and/or eating prior to the arrest. Because providing this information to the prosecutor and expert can be viewed as self-incrimination, defendants are not required to provide this information, which prevents the expert witness from back estimating the alcohol level at the time of the traffic stop. This interferes with prosecution of the case.

Twice in the past three years, the New Mexico courts have asked that the legislature to address this issue in the law. This bill will do so and will eliminate the need for expert witnesses from SLD in approximately 90% of the alcohol DWI prosecutions in the state.

The scientific literature indicates that a chemical test for alcohol taken two hours after the driving stop provides a good estimate of the alcohol at the time of the traffic stop. A chemical test for alcohol taken within three hours of the traffic stop will provide an estimate either the same or slightly lower than the alcohol at the time of the traffic stop. In neither case will the reading within three hours of the traffic stop overestimate the alcohol level at the time of the stop.

Approximately 14 other states, as well as Canada, have adopted windows of time for the chemical test up to four hours after the traffic stop.

The three-hour window proposed by this bill mirrors the three-hour window already present in the Boating While Intoxicated law, passed by the legislature in 2003 eliminating inconsistencies between the two laws.

ADMINISTRATIVE IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

DUPLICATION/ RELATIONSHIP

With the exceptions noted, the following bills duplicate SB 443: HB 403, HB 420, and SB 440. HB 420 differs from SB 443 in that it does not include the requirement that the alcohol concentration results from alcohol consumed before or while driving, and HB 420 only amends Section 66-8-102, without also amending Section 66-8-110 as does HB 403. SB 440 is the same as SB 443, including the amendment of Section 66-8-110, except that SB 440 does not include the requirement that the alcohol concentration results from alcohol consumed before or during driving. SB 443 amends Section 66-8-102 exactly as HB 403 does; however, SB 443 does not amend Section 66-8-110 at all.

OTHER SUBSTANTIVE ISSUES

The concentration of blood-alcohol in the body depends on a number of factors including body weight, gender, presence of food and the type of food in the stomach when alcohol is consumed, the quantity and rate at which drinking alcohol occurs, and the rates of alcohol absorption and metabolism.

For example, the rate at which alcohol is absorbed into the body depends on how quickly the stomach empties its contents into the intestine. Women absorb and metabolize alcohol differently from men. Women have a higher BAC after consuming the same amount of alcohol as men.

Blood alcohol analysis in DWI cases is the attempt to measure the amount of alcohol within the person's blood at any given time.

This bill appears to rely on the use of retrograde extrapolation. Retrograde extrapolation is the

process by which someone’s blood alcohol concentration at the time of driving is estimated by projecting backwards from a later chemical test. This process involves estimating the absorption and elimination of alcohol in the time period between driving and testing.

The use of this process relies on assumptions regarding the amounts of alcohol and food consumed and the time taken to consume the alcohol and food. The process also assumes that absorption of alcohol has been completed and the peak BAC has been reached.

The difficulty in this process is the reasonableness and justifiability of the assumptions made. When reasonable and justifiable assumptions are made alcohol elimination rates of .015 of blood alcohol concentration to .020 blood alcohol concentration per hour can be assumed.

In practical terms this means that an individual who has a BAC of .08 three hours after the stop and arrest will have had a BAC of .04 at the time of the stop. This is calculated as:

BAC Test	First hour	Second hour	Third hour	Extrapolated Measure
.08	- .015	- .015	- .015	= .04

DW/mt